No. 06-1410

Supreme Court, U.S.
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In The Supreme Court of the United States

IDAHO,

Petitioner,

vs.

KRISPEN ESTRADA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court of Idaho

BRIEF OF *AMICI CURIAE* OF THE STATES OF IOWA, ARKANSAS, COLORADO, MICHIGAN, MINNESOTA, MONTANA, NEVADA, NEW HAMPSHIRE, NORTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, AND WEST VIRGINIA, AND THE COMMONWEALTH OF PUERTO RICO IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

May a sentencing court draw adverse inferences from a defendant's refusal to cooperate in a presentencing evaluation without violating the Fifth Amendment privilege against self-incrimination?

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INTEREST OF THE *AMICI CURIAE*

The *amici* states, through their Attorneys General, respectfully submit their brief in support of the petitioner.

The states have a substantial interest in ensuring the accurate sentencing and rehabilitation of defendants following their criminal convictions. To that end, presentence investigation reports provide a central source of information for sentencing judges and departments of corrections. Moreover, psychosexual examinations are an important tool in evaluating the ongoing risk and treatment needs of sexual offenders. The states' efforts in gathering pertinent information about sexual offenders would be hindered if other state appellate courts were to follow the lead of the Idaho Supreme Court in broadly interpreting the Fifth Amendment privilege against self-incrimination to allow convicted sex offenders to refuse participation in such evaluations without any worry that the sentencing court may draw an adverse inference from that refusal.

A defendant's willingness to cooperate with presentence investigators provides a good measure of whether he or she will respond to rehabilitative efforts and pose no further threat to society. Forcing a sentencing court to turn a blind eye to a defendant's lack of cooperation diminishes the accuracy of sentencing determinations, while not advancing the purposes of the Fifth Amendment privilege.

State appellate courts have reached inconsistent decisions whether sentencing courts may draw adverse inferences from a convicted defendant's silence at sentencing regarding matters other than the facts of the offense. Such inconsistency leaves the states in doubt about their

ability to enforce court orders regarding participation in psychosexual evaluations and other presentence investigations and to argue noncompliance as a factor in their sentencing recommendations. A consistent and appropriately narrow application of the Fifth Amendment in the sentencing context is of great importance to the *amici* states.

For these reasons, 15 states urge the Court to grant certiorari and resolve this important question.

REASONS FOR GRANTING THE PETITION

In *Mitchell v. United States*, 526 U.S. 314 (1999), the Court expressly left open the question of whether the no-adverse-inference rule applies at sentencing outside the judicial fact-finding context. Lower courts, in addressing that open question, have experienced the "decent period of confusion" anticipated by the dissent. *See Mitchell v. United States*, 526 U.S. at 340 (1999) (Scalia, J., dissenting). Idaho's petition should be granted to clarify the scope of the Fifth Amendment privilege as applied to cooperation with presentence investigations.

This Court has interpreted the Fifth Amendment as prohibiting a trial court from drawing an adverse inference based on the defendant's silence at the sentencing hearing when determining facts about the crime which bear upon the severity of the sentence. *Mitchell v. United States*, 526 U.S. at 316-17. Although the Idaho Supreme Court did not cite *Mitchell* in *Estrada v. State*, 149 P.3d 833 (Idaho 2006) decision, the state appellate court implicitly expanded the no-adverse-inference rule to shield a convicted rapist from any consequences related to his refusal to

cooperate with a court-ordered psychosexual evaluation. Such an expansive interpretation of *Mitchell* will deprive sentencing courts of valuable information about convicted sex offenders which can be gathered only through psychosexual evaluations.

The states advance two reasons for granting the petition. The first reason is a practical one: an expansion of the no-adverse-inference rule beyond the facts in *Mitchell* will reduce the flow of information to sentencing courts. The second reason is more theoretical: the renaissance of the Sixth Amendment jury trial right, whereby no sentence-enhancing facts may be reserved for determination by the sentencing judge, should influence this Court's view of how broadly to apply the Fifth Amendment privilege against self-incrimination at sentencing.

On the practical side, many state statutes now require or permit courts to order convicted sex offenders to undergo psychosexual evaluations before sentencing. These evaluations provide much-needed insight into an offender's potential for recidivism, treatment amenability, supervision concerns, potential risk issues and treatment goals. If the reasoning in *Estrada* carries the day, convicted sex offenders have little incentive to submit to a court-ordered evaluation. Courts could draw no inference from their refusal, while submitting to the testing could reveal damaging facts about their deviant sexual history. Without access to the information obtained in psychosexual evaluations, sentencing courts will reach less accurate sentencing decisions. State courts have reached inconsistent decisions when applying *Mitchell's* no-adverse-inference rule to presentencing issues. It is important to the states that this Court enunciate a clear rule regarding a sentencing court's ability to consider a defendant's noncompliance with court-ordered presentence evaluations.

On the theoretical side, this Court should grant review to consider whether recent case law reinvigorating the Sixth Amendment jury trial guarantee also should inform the Fifth Amendment self-incrimination analysis. This Court's Sixth Amendment jurisprudence has begun to extricate elemental findings from the sentencing realm and return them to be adjudicated by a jury at trial. *See, e.g.*, *United States v. Booker*, 543 U.S. 220 (2005) (mandatory use of federal sentencing guidelines violated right to jury trial on any fact required to enhance a criminal sentence); *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (holding that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt). This move to restore the Sixth Amendment jury trial right requires reexamination of the extension of the Fifth Amendment right against self-incrimination into non-capital sentencing decisions.

This Court's case law has "long recognized a natural dichotomy between guilt and penalty phases." *Mitchell v. United States*, 526 U.S. at 338 (Scalia, J., dissenting). Because many facts which increase the penalty for a crime may not be determined at sentencing under the resurgence of the Sixth Amendment jury trial right, Fifth Amendment self-incrimination concerns at sentencing are greatly reduced. This Court should grant review to consider the impact of *Apprendi* and its progeny on the potential expansion of the no-adverse-inference rule of *Mitchell*.

I. Expansive interpretations of *Mitchell v. United States* leave convicted defendants with little incentive to cooperate with court-ordered psychosexual evaluations, curtailing the availability of valuable information to assist sentencing courts in reaching the appropriate disposition for sexual offenders like Estrada.

The states have a keen interest in reducing sex crime recidivism by imposing appropriate sentences and providing offenders with the most effective treatment and supervision. To successfully manage sex offenders, "key decision makers must have routine access to thorough, reliable, and individualized assessment data, including presentence investigations and psychosexual evaluations conducted by specially trained sex offender management professionals." Madeline Carter, Kurt Bumby and Thomas Talbot, *Promoting Offender Accountability and Community Safety through the Comprehensive Approach to Sex Offender Management*, 34 Seton Hall L. Rev. 1273, 1282 (2004). More generally, presentence investigation (PSI) reports are "critical in assisting judges in rendering sentencing decisions and providing vital information to correctional officials in determining classifications and release decisions" and "remain the most influential document in the sentencing of criminal defendants." Daniel Macallair, *The History of the Presentence Investigation Report*, Center on Juvenile and Criminal Justice (2002).[1]

More than 50 years ago, this Court endorsed the work of presentence investigators and the value of their product to accurate sentencing determinations:

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[1] This article is available at www.cjcj.org/pubs/index.php, last visited on May 7, 2007.

> Under the practice of individualizing punishments, investigation techniques have been given an important role. Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders. Their reports have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guesswork and inadequate information. [] To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation.

Williams v. New York, 337 U.S. 241, 250 (1949) (rejecting argument that due process prohibited sentencing court from considering information obtained outside the courtroom concerning "the convicted person's past life, health, habits, conduct, and mental and moral propensities").

In preparation for sentencing Estrada on his rape conviction, the Idaho district court ordered him to undergo a psychosexual evaluation. Idaho state law requires certain offenders to undergo a psychosexual evaluation upon conviction if mandated by the court. The statute provides:

> If ordered by the court, an offender convicted of any offense listed in section 18-8304, Idaho Code, shall submit to an evaluation to be completed and submitted to the court in the form of a written report from a certified evaluator as defined in section 18-8303, Idaho Code, for the court's consideration prior to sentencing and incarceration or release on probation.

Idaho Code § 18-8316. Idaho state law defines a psychosexual evaluation as "an evaluation which specifically addresses sexual development, sexual deviancy, sexual history and risk of reoffense as part of a comprehensive evaluation of an offender." Idaho Code § 18-8303(11).

The evaluation did not seek the defendant's testimony on any fact regarding the crime the State needed to prove to increase his punishment. Rather, "[t]he information provided in the evaluation allowed the district court to make a more informed, appropriate sentencing decision that best furthered the sentencing goals set forth in [Idaho Code] § 19-2521." *Estrada v. State*, 2005 WL 2436232 (Idaho App. 2005), *reversed by Estrada v. State*, 149 P.3d 833 (Idaho 2006).

When Estrada balked at being evaluated, his attorney advised him to submit to the evaluation: "We would not want the judge to consider your lack of cooperation to mean that you are not willing to comply with court orders." That advice should have been considered sound. A convicted sex offender's refusal to comply with a court-ordered evaluation may inform a sentencing court's belief that he did not accept responsibility for his offense, that he posed a continuing danger to others or that he did not show much promise for rehabilitation – all traditional, legitimate sentencing considerations. *See Roberts v. United States*, 445 U.S. 552, 558 (1980) ("By declining to cooperate, petitioner rejected an 'obligatio[n] of community life' that should be recognized before rehabilitation can begin.").

However, the Idaho Supreme Court concluded that counsel was ineffective for failing to advise the defendant that he had a Fifth Amendment right to ignore the court

order without consequence at sentencing. Such an expansive interpretation of the privilege against self-incrimination compromises routine access to pertinent information about the offender gathered by psychosexual evaluations and compiled in presentence investigation reports. The likelihood that convicted defendants will comply with court-ordered testing is lessened by an appellate decision that the Fifth Amendment allows defendants to snub such evaluations without consequence.

Like Idaho, numerous state legislatures have adopted statutes either requiring or allowing courts to order a convicted offender to undergo a psychosexual or other psychological evaluation to assist them in choosing the appropriate sentence. *See, e.g.,* Colo. Rev. Stat. § 16-11-102 ("the court, in cases that it deems appropriate, may require the presentence report to include the findings and results of a professionally conducted psychiatric examination of the defendant"); Iowa Admin. Code § 201-38.4 (903B) ("A psychosexual assessment shall be conducted on all [serious sex] offenders, as a part of the presentence investigation (PSI) prior to sentencing."); Minn. Stat. § 609.3457 ("When a person is convicted of a sex offense, the court shall order an independent professional assessment of the offender's need for sex offender treatment to be completed before sentencing."); Mont. Code § 46-18-111 (requiring presentence investigation for sex crimes to include "psychosexual evaluation of the defendant and a recommendation as to treatment of the defendant in the least restrictive environment, considering the risk the defendant presents to the community and the defendant's needs"); Nev. Rev. Stat. § 176.139 ("If a defendant is convicted of a sexual offense for which the suspension of sentence or the granting of probation is permitted, the

division shall arrange for a psychosexual evaluation of the defendant as part of the division's presentence investigation and report to the court."); S.D. Codified Laws § 22-22-1.3 (person convicted of a sex crime "shall have included in the offender's presentence investigation report a psychosexual assessment including the following information: the offender's sexual history; an identification of precursor activities to sexual offending; intellectual, adaptive and academic functioning; social and emotional functioning; previous legal history; previous treatment history; victim selection and age; risk to the community; and treatment options recommended"); Tenn. Code Ann. § 39-13-704(2) (establishing "sex offender treatment board" which determined that psychosexual evaluations are useful tools in the treatment and evaluation of sex offenders); Vt. Stat. tit. 13 § 5405 ("The court shall order a presentence investigation which shall include a psychosexual evaluation of the offender."); Wash. Rev. Code § 9.94A.505 (legislature authorized trial court discretion to order psychosexual evaluations).

States without a specific statute authorizing psychosexual evaluations have interpreted their presentence investigation statutes as allowing a court to order such an evaluation. *See, e.g., Hines v. State*, 856 N.E.2d 1275, 1278 n.2 (Ind. App. 2006) (interpreting Indiana Code § 35-38-1-9); *State v. Thorkelson,* 84 P.3d 854, 857 (Utah App. 2004) ("while a psychosexual evaluation may be useful in sentencing, it is not mandatory").

Despite these legislative efforts to provide sentencing courts and corrections officials with more accurate information about sexual offenders' placement and treatment needs, questions about the breadth of *Mitchell's* no-adverse-inference rule leave states with an uncomfortable

uncertainty. It is unclear whether courts may enforce their orders for evaluations. It is unclear whether defense attorneys may advise their clients to cooperate with psychosexual evaluations. It is unclear whether prosecutors may urge courts to consider noncompliance for its relevance to a defendant's failure to accept responsibility, future dangerousness, lack of remorse or similar sentencing factors.

Emblematic of the uncertainty are the contradictory conclusions regarding the reach of the Fifth Amendment privilege adopted by appellate courts in the neighboring states of Idaho and Wyoming. As it now stands, sentencing courts in Wyoming may consider a convicted defendant's refusal to submit to a psychological evaluation in determining the appropriate penalty (*Lee v. State*, 36 P.3d 1133 (Wyo. 2001), but sentencing courts in Idaho may not (*Estrada v. State*, 149 P.3d 833 (Idaho 2006)). The Wyoming Supreme Court held: "A defendant's failure to cooperate in the PSI is certainly a valid factor for a trial court to consider in contemplating the appropriate sentence." *Lee v. State*, 36 P.3d at 1141.[2] In reviewing this state court decision on habeas, the Tenth Circuit noted: "it remains unanswered by the Supreme Court whether a sentencing court in a non-capital case may, for purposes other than determining the facts of the offense of conviction, draw an adverse inference from a criminal defendant's refusal to testify or cooperate." *Lee v. Crouse*, 451 F.3d 598, 605 (10th

[2] Other state courts have reached similar post-*Mitchell* decisions. *See, e.g., State v. Palmer*, 608 N.W.2d 378, 2004 WL 240012 (Iowa Ct. App. 2004); *State v. Muscari*, 807 A.2d 407, 416 (Vt. 2002); *State v. Blunt*, 71 P.3d 657, 662 (Wash. App. 2003) (sentencing court did not violate Fifth Amendment in noting defendant's failure to challenge State's proof of prior convictions).

Cir. 2006). The federal court therefore concluded that the Wyoming court's decision was not contrary to or an unreasonable application of clearly established federal law. *Id.* at 606.

The lack of clearly established federal law on this issue calls for resolution by this Court. The states need a definitive answer whether the privilege against self-incrimination allows defendants to skip court-ordered evaluations without suffering any consequence for their recalcitrance. The states' efforts to provide sentencing courts with the best possible information about sexual offenders will be thwarted by the continuing uncertainty posed by cases like *Estrada*.

II. Because sentence-enhancing facts must be found by the jury and not the sentencing judge under the Sixth Amendment, an expansion of the Fifth Amendment privilege at sentencing is not necessary to protect defendants from giving incriminating testimony about the crime which could increase the maximum penalty.

In delivering the majority opinion in *Mitchell v. United States*, Justice Kennedy acknowledged: "It is true, as a general rule, that where there can be no further incrimination, there is no basis for assertion of the privilege." *Mitchell v. United States*, 526 U.S. 314, 326 (1999). The majority reasoned, however, that "[w]here the sentence has not yet been imposed a defendant may have a legitimate fear of adverse consequences from further testimony." *Id.* In *Mitchell*, the "further testimony" sought from the defendant at sentencing involved the quantity of drugs she conspired to distribute. *Id.* at 320.

The *Mitchell* Court rejected the government's argument that the district court was entitled, based on her silence, to draw an adverse inference with regard to the amount of drugs attributable to her. *Id.* at 329. The Court then cited *Griffin v. California*, 380 U.S. 609 (1965) for the proposition that "in a criminal case . . . no negative inference from the defendant's failure to testify is permitted." *Id.* The Court declined to adopt an exception for "the sentencing phase of a criminal case with regard to factual determinations respecting the circumstances and details of the crime." *Id.*

Justice Kennedy, however, emphasized the narrowness of *Mitchell's* holding:

> Whether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility for purposes of the downward departure in [the federal sentencing guidelines] is a separate question. It is not before us, and we express no view on it.

Id. at 330.

Commentators have concluded that "[b]y limiting its opinion to inferences about facts alone, the Court left open the possibility that a valid assertion of the privilege could be considered for some purposes (assessing the defendant's character or willingness to cooperate, for example), but not other purposes (assessing the existence of particular historical facts relevant to sentence)." Wayne R. LaFave, Jerold H. Israel and Nancy J. King, 5 Criminal Procedure § 26.4 (2007); *see also* Anthony J. Phelps, *Applicability of the Fifth Amendment Privilege Against Self-Incrimination at Sentencing: Mitchell v. United States Settles the Conflict,* 38 Brandeis L. J. 107, 128 (1999-2000) ("The Court's

holding still allows a court's broad query into sentencing-related matters; it simply requires prosecutors to bear the burden of establishing essential sentencing-based facts, thereby preventing defendants from becoming witnesses against themselves.").

The *Mitchell* Court's holding that the Fifth Amendment prevents the government from relying on a convicted defendant's silence at sentencing to prove additional facts about the crime which could elevate the punishment predated significant changes in Sixth Amendment jurisprudence which limit the type of facts which may be left to a sentencing judge. A year after issuing *Mitchell*, this Court decided *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), holding that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

Apprendi ushered in a line of cases strengthening the Sixth Amendment jury trial right. In *Ring v. Arizona*, 536 U.S. 584, 610 (2002), this Court expanded *Apprendi*'s reach by holding that capital defendants are "entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." In *Blakely v. Washington*, 542 U.S. 296, 303 (2004), this Court clarified that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. In *United States v. Booker*, 543 U.S. 220 (2005), this Court declared that the mandatory use of federal sentencing guidelines violated the right to jury trial on any fact required to enhance a criminal sentence. Finally, in *Cunningham v. California*, ___ U.S. ___, 127 S. Ct. 856 (2007), this Court found that California's

determinate sentencing law violated the Sixth Amendment, as understood in *Apprendi,* by granting the judge rather than the jury the power to find facts which raise the maximum lawful sentence.

In the wake of *Apprendi* and its progeny, a question arises whether the new constitutional rules for modern sentencing schemes should include an expansive reading of the Fifth Amendment privilege against self incrimination. Justice Kennedy's reasoning for the majority in *Mitchell* suggested a dichotomy between factual determinations respecting the circumstances and details of the crime and factors exhibited by the defendant, such as acceptance of responsibility or lack of remorse. *Mitchell v. United States*, 526 U.S. at 330.[3] Now that facts essential to the punishment must be determined by the jury's verdict alone, the *Mitchell* majority's concern about a convicted defendant's risk of giving incriminating testimony before the sentencing judge is abated.

This Court has interpreted the Fifth Amendment guarantee that no person be compelled in "any criminal case" to be a witness against himself as broader than the Sixth Amendment guarantee of a jury trial "in all criminal prosecutions." *See Counselman v. Hitchcock*, 142 U.S. 547, 563 (1892).[4] However, the Fifth Amendment's object is "to

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[3] The majority in *Cunningham* rejected Justice Kennedy's distinction between facts concerning the offense and facts concerning the offender for jury trial purposes. *Cunningham v. California*, 127 S. Ct. at 869 n.14.

[4] In his *Mitchell* dissent, Justice Scalia did not adhere to the *Counselman* observation, instead asserting that the phrase "in all criminal prosecutions" from the Sixth Amendment was "indistinguishable" from the "in any criminal case" terminology in the Fifth Amendment. *Mitchell v. United States*, 526 U.S. at 338 (Scalia, J., dissenting).

insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime." *See United States v. Zucker*, 161 U.S. 475, 482 (1896). Thus, testimony about facts of the crime or the government's attempt to use the offender's silence to "infer commission of disputed criminal acts," even at sentencing, would implicate the Fifth Amendment. *See Mitchell*, 526 U.S. at 329. On the contrary, the results of an offender's psychosexual evaluation, or the use of the offender's refusal to submit to an evaluation to infer he is not amenable to treatment, would not implicate the Fifth Amendment. Where the fact considered by the sentencing court does not increase the punishment beyond its statutory maximum, the defendant would have neither a jury trial right under the Sixth Amendment nor would he be compelled to be a witness against himself under the Fifth Amendment.

In *United States v. Booker*, 543 U.S. at 233, this Court reiterated that the Sixth Amendment permits only the jury to find those facts which have fixed and predictable sentencing consequences, but also recognized that judges may consider factors not adjudicated at trial when making discretionary sentencing decisions. *See* Douglas A. Berman and Stephanos Bibas, *Making Sentencing Sensible,* 4 Ohio St. J. Crim. L. 37, 57-58 (2006). Professors Berman and Bibas describe this fact/judgment distinction as follows: "*Booker* safeguards the notion of sentencing as a distinct criminal justice enterprise that requires the exercise of reasoned judgment, not just offense fact-finding." *Id.* at 58.

This distinct enterprise of sentencing and the role of judicial discretion in reaching a "more enlightened and just sentence" was recognized in *Williams v. New York*, 337

U.S. 241, 251 (1949). In *Booker*, this Court cited *Williams* right beside *Apprendi* to support the statement: "We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range." *United States v. Booker*, 543 U.S. at 233. As such, *Apprendi*'s limit on judicial fact-finding at sentencing under the Sixth Amendment did not undermine *Williams*' approval of discretionary sentencing against a due process challenge. Kyron Huigens, *Solving the Williams Puzzle*, 105 Colum. L. Rev. 1048, 1056 (2005). Sentencing judges will be less able to carry out their specialized role if they are prohibited under the Fifth Amendment from considering a defendant's failure to cooperate with presentencing evaluations, a fact not reserved for the jury under *Apprendi*.

Under the regime started in *Apprendi*, fewer "factual determinations respecting the circumstances and details of the crime" are left to the sentencing court. As such, sentencing courts are focused on traditional factors influencing what penalty to assign based on the characteristics of a particular defendant, such as acceptance of responsibility, lack of remorse, risk of re-offending and amenability to rehabilitation. A defendant's decision whether to comply with a psychosexual evaluation or other aspects of the presentencing investigation bears on these traditional sentencing factors. Ordering the defendant to submit to a psychosexual evaluation does not compel him to be a witness against himself in a criminal case. It compels him to reveal facts about himself which are independent of the crime already adjudicated and useful to the discretionary assessment entrusted to the sentencing judge.

The reinvigoration of the jury trial right in criminal prosecutions allays the concern underlying *Mitchell* that a

defendant's decision to remain silent about a fact of the offense which the government sought to prove at sentencing should not give rise to an adverse inference by the sentencing court. The Idaho Supreme Court's decision failed to recognize the impact of *Apprendi* on the scope of the privilege against self-incrimination at sentencing. Granting the petition would provide this Court an opportunity to consider the interplay between Fifth Amendment and Sixth Amendment case law governing sentencing jurisprudence.

CONCLUSION

For these reasons, the *amici curiae* states respectfully request that the petition for writ of certiorari be granted.

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